Supreme Court, U.S.
FILED
MAY 13 2002
OFFICE OF THE CLERK

No. 01-1247

In The

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
CHRISTIE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY OF PETITIONER STATE OF WISCONSIN

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Wisconsin submits this reply to the briefs of EPA and the Tribe opposing the state's Petition for Writ of Certiorari.

I. REVIEW IS WARRANTED TO DETERMINE THE IMPORTANT QUESTION WHETHER AN INDIAN TRIBE'S INHERENT AUTHORITY EXTENDS TO THE REGULATION OF NAVIGABLE WATERS OVER WHICH A STATE EXERCISES SOVEREIGNTY PURSUANT TO THE EQUAL FOOTING DOCTRINE.

In its brief, EPA attempts to obscure and minimize the important legal issues presented by the petition. It does so by distorting the agency's own interpretation of the governing statute, and by suggesting that the outcome below was merely a pedestrian, fact-based decision derived from circumstances unique to this case. Contrary to its purpose, EPA's obfuscation of the issues reinforces the importance of this appeal.

EPA, with the sanction of the court below, has recognized a new species of tribal authority not grounded in the decisions of this Court, namely the power to regulate natural resources owned by a state and lying within the state's sovereign domain.[1] There are only two possible sources of tribal power to regulate a state's sovereign waters: inherent authority, pursuant to the principles recognized by this Court, or federal power Congress has delegated to tribes. *Montana v. United States*, 450 U.S. 544, 564 (1981) ("exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive

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[1] Although EPA now claims it has not conceded Wisconsin's ownership of the navigable waters at issue here, EPA brf. at 15 n.6, neither EPA nor the Tribe offered any evidence to counter Wisconsin's explicit claim of ownership of the beds. (App. 71a-72a) Nor could they plausibly do so, given that Wisconsin obtained the waters nearly 90 years before the reservation was created from the lands adjacent to the waters. (App. 108a-109a)

without express congressional delegation.") Neither exists here.

EPA has expressly determined that in enacting the TAS provision, 33 U.S.C. § 1377(e), Congress did not delegate any federal power to tribes. From the beginning, EPA has steadfastly concluded that the statute "authorizes use of *existing* Tribal regulatory authority for managing EPA programs, but it does not grant additional authority to Tribes." 54 Fed. Reg. 39,101 (1989) (emphasis added). Accordingly, "Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law." (56 Fed. Reg. 64,880 (1991) (App. 105a).

Remarkably, EPA's brief never mentions the agency's longstanding conclusion that 33 U.S.C. § 1377(e) is not a delegation of federal power. Instead, EPA offers that Congress "set out the relevant standards for TAS status in Section 1377(e)," and, directly contradicting its explicit interpretation of section 518(e), now asserts that "this case does not arise out of a Tribe's bare assertion of inherent authority, but under the specific provisions of the CWA." EPA Brf. in Opp. at 15, 18.

EPA's muddled assertion cannot be reconciled with its position that the statute *requires* a tribe to demonstrate inherent authority as a condition of obtaining TAS status. EPA can evade its own requirement that tribes demonstrate inherent authority to regulate reservation waters only if it disowns the agency's formal, longstanding interpretation of the statute and amends its rule requiring an applicant tribe to show it possesses authority over the waters it seeks to regulate. *See* 40 C.F.R. § 131.8(b)(3)(ii) (2001) (requiring "[a] statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes [sic] assertion of authority.") Neither here nor in any of the proceedings below has EPA disavowed its position on delegation.

Nonetheless, EPA now adopts the legal non-sequitur embraced by the court of appeals, namely that because the United States can regulate navigable waters despite state ownership of them, tribes must be able to as well. EPA brf. at 15-16. However, tribes—like states—do not partake of federal power unless Congress shares it with them. The absence of any delegation of federal authority to tribes renders inapposite the existence or scope of federal power over navigable waters, which has never been an issue in this case.[2]

According to EPA's own rules and policies, if the Tribe has authority to regulate Wisconsin's waters, that authority must arise from the principles of inherent tribal sovereignty embraced by this Court. Yet EPA identifies no precedent supporting the proposition that a tribe can exercise regulatory authority over a state's sovereign resources, either inside or outside of a reservation. As EPA emphasizes, this Court's precedent primarily has dealt with the extent of tribal authority over the conduct of nonmembers on fee lands within reservations. EPA brf. at 16-18. Neither this Court nor any appellate court except the one below has ever addressed directly the first question presented in the petition–whether tribal inherent authority can displace state sovereignty over navigable waters under the equal footing doctrine.[3]

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[2] The primary theme of the Tribe's brief is that the regulatory power of the United States under the commerce clause supersedes state sovereignty under the equal footing doctrine. *See* Tribe's brf. at 11-13, 15-17. Without a delegation of federal power to tribes, this argument is irrelevant.

[3] EPA unprofitably relies upon *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. den.*, 522 U.S. 965 (1997), and *State of Mont. v. U.S. E.P.A.*, 137 F.3d 1135 (9th Cir.), *cert. den.*, 525 U.S. 921 (1998). EPA brf. at 11. *City of Albuquerque* did not involve a challenge to the grant of TAS status to the tribe, but only to the validity of the specific tribal water quality standards approved by EPA. Neither of the questions presented here was present in that case. 97 F.3d at 419-20. *State of Montana*, while addressing the second exception, did not address the question whether tribal water quality standards could be applied to navigable waters whose bed and banks are owned by the affected state.

EPA acknowledges that the *Montana* second exception applies to the exercise of tribal authority over nonmembers on fee lands within a reservation, a situation "wholly absent from this case."[4] EPA brf. at 13. But it leaves unanswered the critical question: if the *Montana* line of cases does not supply the doctrinal basis for tribal authority here, what precedent does?

EPA and the Tribe imply that because the waters are important to the Tribe, the Tribe must possess inherent authority to regulate them, notwithstanding that they belong to the state and that there are no nonmembers present on the reservation who pose a threat to the waters. But they cite no decision of this Court sanctioning this notion.

The Tribe also suggests that because there are no nonmembers on the reservation, TAS status only allows it to regulate "the activities of tribal members on tribal lands affecting reservation water quality which it had the right to do." Tribe's brf. at 23. But this case is not about the Tribe's undisputed ability to regulate its own members, or tribal lands. A tribe does not need TAS approval to impose environmental restrictions on its own members or to regulate its own lands. *See Montana*, 450 U.S. at 557, 563-564; *South Dakota v. Bourland*, 508 U.S. 679, 691 n.11 (1993). Instead, this case

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The equal footing doctrine was not implicated there since the tribe—not the state—owned the lakebed at issue. *See Confederated Salish & Kootenai Tribes, Etc. v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982). To the extent the *State of Montana* decision holds that EPA's 1991 regulations represent a correct interpretation of the second exception, it reinforces the need for this Court to underscore to EPA that the regulations' effective presumption in favor of inherent authority cannot be squared with the rule of *Montana* and subsequent cases.

[4] In fact, the absence of nonmembers and fee land within the reservation precludes a finding of tribal authority under the *Montana* second exception, since there is no threat of harm to the Tribe from nonmember conduct on the reservation.

is about tribal regulation of decidedly non-tribal lands—namely navigable waters owned by a state and over which a state acquired sovereignty at statehood under the equal footing doctrine. Indeed, the absence of fee lands makes this case an ideal one for squarely addressing the conflict between tribal inherent authority and state sovereignty under the equal footing doctrine.

EPA and the Tribe also assert, erroneously, that nonmembers will not be affected by the Tribe's TAS authority. To the contrary, EPA requires upstream dischargers to comply with downstream water quality standards; thus nonmember dischargers upstream of reservations would have to comply with tribal water quality standards. *See Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). More fundamentally, EPA and the Tribe ignore the direct and palpable infringement on Wisconsin's sovereignty arising from a tribe's ability to regulate the state's resource. Although the state's sovereignty over its navigable waters is undeniably subject to the exercise of commerce clause power by the United States, it cannot be overridden by the inherent authority of an Indian tribe. The clash of competing claims of sovereignty is presented here pure and unadulterated. Whether tribes possess inherent authority over navigable waters that passed to a state under the equal footing doctrine is, Wisconsin submits, a legal question not dependent on the particulars of the water body and its uses.

The failure of EPA and the Tribe to identify any support for the new species of tribal power impliedly recognized by the decision below reinforces the significance of the overarching legal question in this case, namely what relevant principles of Indian law recognize tribal power to regulate navigable waters belonging to a state and subject to state sovereignty?

II. THE ISSUES PRESENTED HERE ARE NOT FACT-BOUND.

An oft-repeated mantra in EPA's brief is that the agency's decision was "fact-specific," thereby presumably limiting the importance of a decision in this case. *See, e.g.*, EPA brf. at 10, 12-13. EPA's suggestion that it undertakes a "Tribe-by-Tribe" approach based on the unique facts of each tribe is disingenuous. EPA brf. at 20. As Wisconsin has already observed, EPA has created a virtually no-fail test for TAS status, under which a tribe need only assert that the waters on its reservation are important to it.[5] Pet. at 7-8.

Further, although the second issue presented by the petition—whether EPA's decision comports with the *Montana* test for inherent authority—necessarily involves facts, none of the relevant facts are in dispute. Whether a threat of water pollution from off-reservation discharges so endangers tribal self-governance as to preempt Wisconsin's ability to establish and enforce water quality standards on Rice Lake and thereby satisfy the requirements of the second exception is a question of both broad application and unique sovereign importance. The question is particularly compelling given the simple, and uncontroverted, fact that the respondent Tribe has fully adequate state or federal forums to protect any interest claimed in the waters at issue, and thus has no need to assert independent regulatory authority over the resource.

In sum, both questions presented in the petition present legal questions of great nationwide significance for states and

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[5] According to EPA 23 out of 49 tribal applications for TAS authority over the last decade have been approved. EPA brf. at 14 n.5. This information, even if accurate, is unhelpful in itself inasmuch as it does not reflect whether any applications have been denied. Given the delay traditionally accompanying EPA approvals, it may be that the remaining applications are still pending, or were withdrawn. In any event, that 50 tribes applied for TAS status in the first decade of the program is a good indicator of the substantial importance of this issue nationwide.

tribes, as well as the citizens and communities within and near Indian reservations.

CONCLUSION

For the reasons discussed above and in the petition, this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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